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Nos. 75-1289, 75-1299, 75-1304, 75-1305, 75-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE CALIFORNIA COMPANY, A DIVISION OF CHEVRON OIL COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION TO PETITIONS

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION TO PETITIONS

Mobil Oil Corporation, an intervenor in support of the respondent Federal Power Commission below and a respondent here, submits this brief in opposition to petitions for writs of certiorari to review the judgment entered in this case on October 14, 1975 by the United States Court of Appeals for the Fifth Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 1061 (Calco App. A),[1] and the Court of Appeals opinion denying rehearing is reported at 525 F.2d 1261 (Calco App. B). Federal Power Commission Opinion No. 699 is reported at 51 F.P.C. 2212 (Calco App. C); Federal Power Commission Opinion No. 699-H is not yet reported (Calco App. D).

JURISDICTION

Petitioners properly invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

Mobil opposes all petitions seeking review of the judgment of the Court of Appeals, supports the position of the respondent Federal Power Commission, and limits this brief to the following questions:[2]

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[1] References are to the separate Appendix to the Petition of The California Company (Calco) filed in No. 75-1289.

[2] In No. 75-1299, Shell Oil Company, *et al.*, seek review of other questions concerning Commission choices of methodology and findings as to costs which the Court of Appeals held to be within the Commission's authority and discretion and supported by substantial evidence (Shell Pet., pp. 3-4, questions 1 and 3).

In No. 75-1304, American Public Gas Association similarly seeks review of Commission choices of methodology, use of data, and decisions as to costs, which were upheld below on similar grounds (APGA Pet., pp. 2-3, question 2).

In No. 75-1304, American Public Gas Association also seeks review of questions of procedure not actually presented in this case (APGA Pet., p. 2, question 1). In this instance, the Commission proceeded on the basis of successive public notices, sworn comments, data and pleadings, reply comments and pleadings, a public conference on specific issues, applications for rehearing, and oral argument (see Calco App. C-3 - C-18, App. D-4 - D-14). These procedures

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1. Whether the Federal Power Commission properly determined that rates prescribed as "just and reasonable" under Sections 4 and 5 of the Natural Gas Act for "new gas," as defined by the Commission, should be applied to natural gas sold by a producer under a new gas sales contract negotiated by the producer and a pipeline purchaser to replace an earlier long-term contract which has expired by its own terms.

2. Whether the Federal Power Commission reasonably found and concluded that (1) natural gas sold at rates established for "new gas" could not be applied to reduce individual producers' refund liabilities and to earn contingent rate escalations as prescribed and permitted by the Commission's earlier area rate decisions; and (b) individual producers should be afforded the option of selling at the new rates or of continuing to sell at area rates and to earn refund credits and rate escalations permitted by the area rate decisions.

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more than met the "minimal requirements" for "rulemaking" to prescribe rates under the Administrative Procedure Act, 5 U.S.C. § 553 and § 556(d), and the "hearing" requirements of Sections 4 and 5 of the Natural Gas Act where there is no genuine issue of disputed material facts (see Calco App. A-23 - A-22). The decision below thus presents no conflict with constructions of the APA and the Natural Gas Act by the Court of Appeals for the District of Columbia Circuit in *Mobil Oil Corporation* v. *FPC*, 483 F.2d 1238 (1973), and is consistent with other decisions of that court holding that where there is no such genuine issue of material fact, neither the APA nor the Natural Gas Act requires formal "adjudicatory" hearings. See *Pennsylvania Gas and Water Co.* v. *FPC*, 463 F.2d 1242, 1245 (D.C. Cir. 1972); *City of Chicago* v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 1074 (1972); *Municipal Light Boards of Reading and Wakefield, Mass.* v. *FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971); *American Public Gas Association* v. *FPC*, 498 F.2d 718 (D.C. Cir. 1974). Procedures used by the Commission thus represent a permissible middle-ground between "minimal requirements" for "informal rulemaking" under the APA and adjudicatory-type hearings.

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STATUTES INVOLVED

Sections 4, 5, and 7 of the Natural Gas Act, 15 U.S.C. §§ 717c, d, and f, are involved and are set forth in Appendix E to the Petition in No. 75-1289.

STATEMENT

Mobil is an independent producer of natural gas and makes substantial sales in most of the production areas of the United States subject to Commission jurisdiction under the Natural Gas Act. Mobil participated in all proceedings before the Commission in this case and supported the Commission below in seeking affirmance of Commission Opinion Nos. 699 and 699-H. Procedural history pertinent to questions presented is:

1. On December 12, 1972, in its Opinion No. 639, the Commission announced its intention to phase out the so-called "two-tier" pricing or "vintaging" system initiated on an experimental basis in 1960, and to allow natural gas producers to receive the higher "new gas" rate where (1) a gas sales contract expires by its own terms, (2) the producer and the pipeline purchaser negotiate a new long-term contract permitting the higher rate, and (3) the new contract is filed with the Commission as part of an effective rate schedule under Section 4 of the Act. *Area Rates for Appalachian and Illinois Basin Areas*, 48 F.P.C. 1299, reh. denied, 49 FPC 361 (1973).[3]

By notice issued on April 11, 1973 in Docket No. R-389-B, the Commission initiated this case to determine a new uniform national rate for sales of natural gas produced from wells commenced on or after January

[3] This decision was affirmed in *Shell Oil Company* v. *FPC*, 491 F.2d 82 (5th Cir. 1974). Application of the decision to specific contracts and producer rate filings was affirmed in *Public Service Commission for the State of New York* v. *FPC*, —— F.2d —— (D.C. Cir. Nos. 73-1647, *et al.*, decided January 27, 1976).

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1, 1973 (R. 79, 80). In comments filed on May 16, 1973 and during 1974, respondents urged the Commission to apply the policy announced in Opinion No. 639 and permit application of the new rate to new contracts executed on or after January 1, 1973 to replace expired and expiring contracts. Reasons advanced were that such action would be consistent with Commission intent expressed in Opinion No. 639; the new price would encourage recompletions, reworking operations, and installation and maintenance of compression facilities; and the new price would prevent premature abandonment of existing reservoirs (R. 893).

In Opinion No. 699, issued June 21, 1974, the Commission considered the question and concluded that the new rate should apply to ". . . sales made pursuant to contracts executed on or after January 1, 1973, where the sales were formerly made pursuant to permanent certificates of unlimited duration under contracts which expired by their own terms on and after January 1, 1973, in accordance with Opinion No. 639 . . . ." (Calco App. C-2, C-107). The Commission supported this conclusion by reference to the need for additional revenues for expanded exploration and development programs, to offset of claimed attrition in the rate of return reflected in discounted cash flow studies, and to its purposes of encouraging new dedications to the interstate market "whether such new supplies come from new acreage dedications, or from newly drilled wells, or by diversion from other uses" (Calco App. C-108).

Various parties sought rehearing; oral argument followed; and on December 4, 1974, the Commission issued its Opinion No. 699-H, adhering to its decision on this question (Calco App. D-1, D-43 - D-47). In that opinion, the Commission found that claims for a higher rate of return were offset, in part, by the additional revenues to be available under renewal contracts qualifying for the

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national rate (Calco App. D-34); adhered to its views that eligibility was limited to contracts replacing a contract expiring by its own terms and to situations in which the producer and pipeline purchaser executed a new contract; and stated:

> "In many cases, the purchasing pipeline may desire a *quid pro quo* from the selling producer in the form of additional acreage dedication, exploration and development activity on the previously dedicated acreage, or other similar activities that could result in the dedication of additional new gas supplies to the interstate market. Such concessions by the seller certainly will not be made if the price is allowed to increase to the national rate automatically without the requirement of a renewal contract." (Calco App. D-45 - D-46)

In addition, the Commission found that much of the capital required for exploration, development, and production must come from "gas production revenues" (Calco App. D-55), and that the principles adopted would provide additional revenues, as contracts were renewed, and additional capital for exploration and development of "new natural gas supplies for the interstate market" (Calco App. D-55). The Commission also included estimates of such additional revenues in its assessment of impact of its decision upon the industry and consumers (Calco App. D-57).

Commission Opinion No. 699-H thus provides that the new rate applies to sales under new contracts executed on or after January 1, 1973 replacing contracts covering sales made under permanent certificates of unlimited duration which expired by their own terms either prior to or after January 1, 1973 (Calco App. D-78).

On review, the Commission's findings and conclusions were challenged, but the Court of Appeals affirmed (Calco App. A-1, A-27). First, the court found that

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there was adequate notice and a fair opportunity to be heard on the "renewal contract issue" before the Commission (Calco App. A-27). Second, the court found that the Commission had applied the new rate "functionally" with the objective of helping to "alleviate the current severe shortage"; that by requiring the prerequisite of a new contract, the Commission believed the purchaser "might be able to negotiate for additional acreage dedication to interstate commerce, or exploration and development activity on previously dedicated acreage or other concessions for the price increase"; and that the conflicting challenges buttressed the court's "deferral to the reasoned expertise of the Commission" (Calco App. A-29). The court held:

> "The FPC has reached a well-considered, expert decision on this issue. The Commission found from evidence in the record that a massive commitment of new funds is necessary to alleviate the natural gas shortage and that internally generated sums are a necessary source of such funds. Additionally, it noted that by phasing out the vintaging practice and attending price variations, all consumers would more equitably bear the burden of financing added exploration." (Calco App. A-30)

The court further noted that the question would be examined in biennial review of the new national rates, and the Commission had struck "a tentative balance between the consumer and investor interests," which it was prepared to reevaluate, and concluded:

> "Under such a circumstance, no party has carried the heavy burden of showing that the Commission's balance is tilted so far in either direction as to be unjust and unreasonable in its consequence. We also consider the decision, although not compelled by the evidence, to be supported by the substantial evidence of a shortage and the need for a massive infusion of funds." (Calco App. A-30)

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"The Commission is not bound by its previous policies. As this Court and the Supreme Court have noted on various occasions, the rate structures which introduced or adjusted vintaging were experimental. It is necessary without a doubt that agencies be permitted latitude to evaluate old experiments and modify or abandon them when their best judgment requires such a course of action." (Calco App. A-31)

2. The Commission provided that the new national rate could not apply to sales of natural gas used to earn credits against individual producers' refund liabilities and escalations of rates permitted by its earlier area rate decisions.

In four area rate decisions, the Commission adopted a "package" rate structure, combining two tiers of rate levels, formulae for discharge of individual producer refund liabilities by dedication of new reserves to interstate purchasers, escalation of rates also tied to levels of new dedications, and moratoria on other rate increases for prescribed future years.[4]

In Opinion No. 699, the Commission determined that producers who elect to discharge their refund obligations by dedicating new supplies under these formulae, or to seek the contingent escalations by such dedications, must continue to price such natural gas at the area rates (Calco App. C-1, C-109 - C-110). The Commission concluded that such treatment was "equitable" and that:

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[4] See *Placid Oil Company* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), aff'd, *Mobil Oil Corporation* v. *FPC*, 417 U.S. 283 (1974); *Texas Gulf Coast Area Rate Case*, 45 FPC 674, ultimately aff'd on remand, *Public Service Commission for the State of New York* v. *FPC*, 516 F.2d 746 (D.C. Cir. 1975); *Other Southwest Area Rate Case*, 47 FPC 99, *aff'd*, *Shell Oil Company* v. *FPC*, 484 F.2d 469 (5th Cir. 1973), *cert. den.*, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 973 (1974); *Permian Basin Area Rate Case II*, 50 FPC 390 (appeal withdrawn).

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> "To allow producers to collect the rate provided by this decision and to discharge their existing obligations and receive the benefits provided under the applicable area rate opinions with the same supplies of natural gas would be contrary to the spirit of the applicable area rate opinions. In essence, we seek to insure that a producer will not receive a double benefit from the rate structure which we establish in this decision." (Calco App. C-110, footnote omitted)

The Commission provided that individual producers must decide whether it is more beneficial to continue under the area rate formulae as to new sales or to obtain the national rate for such sales, and must file waivers as to the escalations and refund credits for sales the producer places under the national rate (Calco App. C-111).[5]

Producers who were beneficiaries of the refund-forgiveness formulae sought rehearing, but the Commission adhered to its conclusions in Opinion No. 699-H (Calco App. D-1, D-63). The Commission pointed out that the refund-forgiveness formulae were components of a total rate design in the area rate decisions, and that it was not reasonable to allow both those benefits and the new national rate for new sales (Calco App. D-64, D-65). In the Commission's view, allowance of both the new rate and the refund credits and contingent escalations allowed by the area rate decisions "would constitute an apostasy" of those opinions (Calco App. D-65).

The Court of Appeals affirmed the Commission, holding:

> "The new national rate is the product of an independent determination of incentives, and, as it is in

[5] For sales placed under the national rate under such an election, the Commission provided for lifting of moratoria on rate increases imposed by the earlier area rate decisions (Calco App. C-115).

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so many other regards, the new rate is not tied to previous determinations. Replacing one incentive structure with another or, viewed in another light, providing a new alternative rate system, is an exercise of Commission discretion which does not amount to retroactive rate regulation. See *Moss* v. *FPC*, 164 U.S. App. D.C. 1, 502 F.2d 461 (1974)." (Calco App. A-42)

ARGUMENT

None of the petitions presents questions requiring or warranting review by this Court:

I. The Court of Appeals Correctly Applied Standards And Principles of Review Required by the Natural Gas Act and Decisions of This Court

Petitioners assert that the judgment below is the result of erroneous application of standards of review under Section 19(b) of the Natural Gas Act and principles expressed by this Court. The assertions are incorrect.

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court held that a "presumption of validity" attaches to exercise of the Commission's expertise, and that the functions of the Courts of Appeals under Section 19(b) were determinations of whether (1) the Commission had abused or exceeded its authority; (2) each of the essential elements of the Commission's rate order is supported by substantial evidence; and (3) the order may be expected "to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable" (390 U.S. at 791-792). The court's responsibility is not to "supplant" the Commission's balance of interests, but "to assure itself that the Commission has given reasoned consideration to each of the pertinent factors" (*Ibid*).

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Thereafter, in *Mobil Oil Corporation* v. *FPC*, 417 U.S. 283 (1974), this Court held that application of these criteria is "primarily the task of the court of appeals"; responsibility "to assess the record to determine whether agency findings are supported by substantial evidence" is vested in the Court of Appeals by Section 19(b); and this Court will intervene "only in what ought to be the rare instance when the standard appears to have been grossly misapprehended or grossly misapplied" (417 U.S. at 309-310).

No such "rare instance" is presented. Controlling standards have been correctly apprehended and properly applied by the Court of Appeals. At the outset, the court noted, in express detail, "the *Permian* prescription" (Calco App. A-14 - A-19). The court then applied the criteria to each of the particulars of the Commission's order challenged below. Use of the "national rate" method was found within Commission authority (Calco App. A-20 - A-23); no error was found as to Commission procedures (Calco App. A-23 - A-27); specific cost findings, details of the rate structure, and Commission methods were found to be reasonable and supported by the record and substantial evidence (Calco App. A-27 - A-44); and the "end result" was sustained (Calco App. A-45).

It is correct that the Court of Appeals applied what was termed "kid-glove" treatment on some issues (Calco App. A-19). However, such deference was suggested in *Permian* (390 U.S. at 767, 791-792, 815); and in *Mobil*, this Court quoted with approval the earlier expression by the Fifth Circuit:

> " 'No one can honestly say that judges have been any more sure than commissioners, as all struggle with a problem that grows out of the peculiar mixture of a simultaneous service and exhaustion of a depletable asset. All have been groping. The day for groping is not yet over. And it does not denigrate what FPC

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> has done to say that much may yet be imperfect and much remains to be done or redone. So we can find that FPC has conscientiously attempted to establish 'just and reasonable' rates within the framework allowed by judicial precedent, yet, it is still experimenting' " (*Mobil, supra*, 417 U.S. at 331).

No party, including Mobil, could assert that perfection, however perceived, has been reached in this case. The Commission frankly states that elements of a national rate structure will be reexamined in its biennial review of such rates (Calco App. C-112 - C-114; D-52 - D-56, D-63). The Court of Appeals similarly recognized that its review ". . . must be tailored to the practical requirements of the circumstances," and the burdens of procedural and evidentiary requirements must not be such that they ". . . would either prolong or complicate the task of the Commission to the point of impossibility." (Calco App. A-23).

Principles stated in *Permian* and *Mobil* thus were apprehended properly; standards of Section 19(b) of the Act were applied properly; and the decision of the Court of Appeals raises no questions requiring intervention of this Court.

II. The Court of Appeals Committed No Error In Affirming The Commission Decision To Allow The New National Rate For Sales Under New Contracts Replacing Expired Contracts

Petitioners in Nos. 75-1304, 75-1305, and 75-1308 seek review of the affirmance of the Commission's decision to allow the new national rate for sales under new contracts filed to replace long-term contracts which have expired or expire by their own terms (APGA Pet., p. 3; NYPSC Pet., p. 3; AGD Pet., p. 2). None of the petitions reflects reasons for review by this Court:

1. Petitioners' criticisms are (1) disagreement with the Court of Appeals' holding that the Commission's

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decision is supported by the record and substantial evidence (APGA Pet., pp. 11, 15-16; NYPSC Pet., pp. 15-22; AGD Pet., pp. 8, 10-11); (2) assertions that the Commission decision is lacking in rational consideration (APGA Pet., pp. 14, 16); NYPSC Pet., pp. 18-19; AGD Pet., pp. 6, 8, 11, 13); or (3) arguments that the Commission should have solved the problem addressed with alternatives more acceptable to these particular petitioners (APGA Pet., pp. 15-16; NYPSC Pet., pp. 22-23; AGD Pet., pp. 9-11).

However, each of these arguments was considered fully by the court below; criteria stated in *Permian* and *Mobil* were applied; and the Court of Appeals correctly concluded:

> "The FPC has reached a well-considered, expert decision on this issue. The Commission found from evidence in the record that a massive commitment of new funds is necessary to alleviate the natural gas shortage and that internally generated sums are a necessary source of such funds." (Calco App. A-29).
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> "Under such a circumstance, no party has carried the heavy burden of showing that the Commission's balance is tilted so far in either direction as to be unjust and unreasonable in its consequence." (Calco App. A-30).

2. The Commission decision corrected an anomalous situation existent under the two-tier pricing system initiated in 1960 and is rationally supported.

Under the area-rate system, two separate ceiling rates were prescribed for "flowing" gas and "new" gas, depending upon date of contract. When a long-term contract covering "flowing" gas expired, the producer had the options of (1) seeking "abandonment" of the sale under Section 7(b) of the Act and a new contract with an interstate or intrastate buyer; or (2) continuing the sale,

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filing a unilateral rate increase to the level selected by the producer, and collecting such increased rate subject to refund pending hearings and decisions on reasonableness. See *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960).

In 1972, the Commission reviewed this situation, the original Commission intent to phase out the "two-price" "vintaging" system, and the need to encourage prompt negotiation of replacement contracts. In its Opinion No. 639, the Commission thus concluded that when the producer and pipeline negotiated a new contract to replace a contract expiring by its own terms, deliveries under the new contract would be eligible for the "new" gas ceiling rate. *Area Rate for Appalachian and Illinois Basin Areas*, 48 FPC 1299, *reh. den.* 49 FPC 361 (1973), aff'd *sub nom Shell Oil Company*, 491 F.2d 82 (5th Cir. 1974).

In this case, the Commission reexamined this policy (Calco App. C-107). The Commission concluded *inter alia*, that sales under "replacement" contracts should be eligible for the new national rate to provide additional revenues for expanded exploration and development and additional dedications to the interstate market (Calco App. C-108 - C-109); a new contract negotiated by and acceptable to the purchaser was a necessary prerequisite to such eligibility (Calco App. D-43, D-45); the Commission thereby sought to assure additional commitments by the producer "in the form of additional acreage dedication, exploration and development activity on the previously dedicated acreage, or other similar activities that could result in the dedication of additional new gas supplies to the interstate market" (Calco App. D-45); and where such new contracts were negotiated, the additional revenues would provide "capital available to those entities which will explore for and develop new natural gas supplies for the interstate market" (Calco App. D-5).

The Court of Appeals' opinion reflects that these conclusions were not reached, as petitioners assert, in isolation and without reference to the extensive record. Thus, the record reflects that all parties had adequate notice and opportunity to be heard on the issue (Calco App. A-27); certain of the cost data before the Commission included then current costs of recompletions, deeper drilling, and "rejuvenating old wells to extend their productive life" (Calco App. A-10), and capital costs of recompletions (Calco App. A-11); the Commission was applying the rate "functionally" (Calco App. A-29); and the Commission had exercised its "discretion after considering all pertinent options" (Calco App. A-30).[6]

Contentions that the court below failed to canvass the record and apply proper standards of review thus are without foundation. The Commission's conclusions were supported and rationally considered, as the court held. Petitioners, in essence, simply seek to substitute their judgment for the reasoned conclusions of the Commission on questions of rate design and policy—questions which Congress entrusted to the Commission, as recognized in *Permian* and in *Mobil*.[7]

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[6] Commission use of a "functional" approach in rate design, to encourage exploration and development, was sanctioned in *Permian* (390 U.S. at 796-798) and again in *Mobil* over objections by New York strikingly similar to those now asserted here (417 U.S. at 319-321). The language of this Court in *Mobil* was similar to that of the court below in its reference to Commission rate design: "From these facts it reasoned that the national rate structure should be functionally applied to provide some of these funds, placing the burden not just on 'new' gas but also on flowing gas for which the primary contract had expired" (Calco App. A-30).

[7] A consistent fallacy in petitioners' arguments on the merits is their basic thesis that "costs" associated with "flowing gas" do not change, or are immune from inflation and rising costs. Yet, even "area rates" prescribed in the 1960s were based on cost components that are not frozen and which increase over time and declining lives of fields and reservoirs. See tabulations of cost components in *Permian Basin Area Rate Proceedings*, 34 FPC 159, 220 (1965);

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3. Petitioners contend that this component of the Commission's rate design will have a dire impact on consumers, ignored by the Commission (APGA Pet., p. 15; NYPSC Pet., pp. 13, 15, 23; AGD Pet., pp. 12-13); but, again, the decisions below refute the inflated figures and exhortations.

First, as the Court of Appeals recognized, the Commission intends to evaluate, in its biennial review of the national rate structure, whether pipelines are negotiating in good faith and whether additional funds generated are reflected in monies committed to exploration and development and volumes of new supplies (Calco App. A-30). Petitioners thus not only seek to second-guess the Commission, but also imply that the Commission cannot be trusted to do what it plainly says it will do, a proposition correctly rejected by the Court of Appeals.

Secondly, petitioners' inflated numbers run afoul of the Commission's conclusion that ". . . today's consumers should share the burden of finding replacement supplies for the supplies which are being exhausted by the consumers" (Calco App. A-30). Petitioners overlook the obvious facts that any impact of the Commission's decision over the next three to five years is dependent upon (1) how many expired contracts pipelines are willing to replace, and (2) subsequent rate orders of the Commission. Moreover, petitioners' numbers, even if valid, can be assessed only in terms of national annual sales volumes exceeding multiples of trillions of cubic feet and required annual reserve additions also exceeding multiples of trillions of cubic feet (Calco App. C-19 - C-28), annual curtailments in multiples of billions of cubic feet (Calco App. C-37 - C-40), and annual capital requirements that can

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Southern Louisiana Area Rate Proceedings, 40 FPC 530, 603 (1968); *Hugoton-Anadarko Area Rate Proceedings*, 44 FPC 761, 937 (1970).

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be expressed only in billions of dollars (Calco App. D-55).

Lastly, petitioners' implications that the Commission did not consider impact of the decision as to replacement contracts is not in accord with the record. The Commission did make a study of projected, potential impact of the overall national rate structure (Calco App. D-56). That study was based on assumptions that *included* supplies to be sold under renegotiated contracts (Calco App. D-57). For all gas eligible for the new rate, including such supplies, the Commission estimated increases in the average residential price ranging from 0.71 per cent to 1.46 per cent in the first year, and after five years, ranging between 4.03 per cent and 16.46 per cent, under a variety of alternative assumptions (Calco App. D-59). The Commission also assessed impact of curtailments on residential, commercial, and industrial consumers, and the higher costs of alternative fuels, concluding:

> "In evaluating the overall public interest, we must consider the benefits to the consumer of an incremental supply of gas to provide reliable gas service compared to the consumer detriment if natural gas supply is reduced. The increased consumer cost attributable to higher well-head gas prices is more than counter-balanced by the more probable assurance of continued service" (Calco App. D-60).

4. The decision of the Commission to allow the national rate for replacement contracts thus was reached after "reasoned consideration" of factors cited by petitioners. Affirmance by the Court of Appeals was in full accord with the record, decisions of this Court, and the functions of the Court of Appeals on questions of substantial evidence under Section 19(b) of the Act.

This question does not require or warrant review by this Court.

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III. The Decision As To Refund Credits and Contingent Escalations Under Area Rate Orders Does Not Conflict With Constructions of The Natural Gas Act By This Court

Petitioners in Nos. 75-1289 and 75-1299 contend that this case presents questions of improper "retroactive rate-making" by the Commission (Calco Pet., pp. 2-3, 5-8; Shell Pet., pp. 3, 11-15). No such questions are presented.

In four area rate decisions, the Commission adopted integrated rate structures. These structures combined rate levels, contingent escalations, formulae under which individual producers could dedicate new supplies to work off refund liabilities incurred by collection of excess amounts during the 1960s and early 1970s, and related moratoria on other rate increases.[8]

The Commission and the courts recognized that the refund-forgiveness schemes accorded preference to producers who had collected the highest rates in the past and discriminated against producers who had made refunds and collected lower rates. See *Mobil Oil Corporation* v. *FPC*, 417 U.S. 283, 321-325 (1974). Even though these benefits were "icing" on the "cake" for the beneficiaries, the Court of Appeals and this Court nevertheless concluded that the recognized inequities were not the "degree of discrimination" which would make the schemes unlawful under the standards of Section 4 of the Act (*Mobil*, 417 U.S. at 324-325).

The Commission opinions in this case left these structures intact. The Commission affords the beneficiaries who still owe refunds the option of continuing to earn credits under the refund-forgiveness formulae, or of electing to receive the new national rate for specific sales and waiving additional credits for such sales under the refund and contingent escalation formulae (Calco App.

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[8] See cases cited in fn. 4, *supra* p. 8.

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C-1, C-109 - C-110, D-64 - D-65). The Commission concluded that such treatment was "equitable," consistent with the "spirit of the area rate" decisions, and prevented "a double benefit" for the beneficiaries of those decisions (Calco App. C-110). Thus, each producer must weigh the comparative benefits individually and then choose to continue to earn the refund credits and escalations, or choose to obtain the higher national rate and waive such credits and escalations (Calco App. D-64 - D-65).

On review, the producers who apparently still owe refunds contended that such treatment constituted "improper retroactive modification" of the area rate decisions (Calco App. A-42). The Court of Appeals disagreed, holding that there was no such modification; the national rate rested upon "an independent determination of incentives"; and replacing one structure, or "providing a new alternative rate system, is an exercise of Commission discretion which does not amount to retroactive rate regulation" (Calco App. A-142).

The holding is correct and not in conflict with this Court's construction of the Natural Gas Act. Certainly, retroactive change of final rate orders is not permitted under this statute,[9] but the Commission has not violated that prohibition. The individual producer decides which of the alternative rate structures is most profitable to that producer; the option of continuing to receive all of the benefits and "iced cake" of the area rate decisions remains available; and the option of receiving the national rate is provided.

What the Commission has done thus simply is to decline to spread even more icing upon the "iced cake." The refund formulae were affirmed as a valid exercise of

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[9] See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *Montana-Dakota Utilities Co.* v. *Public Service Co.*, 341 U.S. 246, 254 (1951).

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Commission discretion in design of a rate structure (*Mobil*, 417 U.S. at 324-326), and so too is the Commission's decision to continue that structure as an available option for those producers who still owe refunds for excess collections in the 1960s and early 1970s.[10]

Questions as to "retroactive ratemaking" therefore are not raised in this case, and there is no conflict with this Court's decisions.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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[10] To paraphrase this Court's observations in *Mobil*, certain producers voluntarily charged the higher rates in the 1960s and 1970s; voluntarily exercised a "business judgment" in declining to settle, reduce rates, and make refunds in those past years; and voluntarily entered into a later settlement, now embodied in the area rate decisions, to work off those refund liabilities. Now, the Commission permits further voluntary exercise of the same "business judgment": if the refund credit formulae still are more profitable, a producer can continue to receive the credits and benefits, but if the "business judgment" is that the national rate is more beneficial, the producer may elect to charge that rate and cease earning the credits (*cf. Mobil*, 417 U.S. at 324-325, 327).

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